2009

# Susan I. Moss and Jamal S. Yanaki v. Parr, Waddoups, Brown, Gee and Loveless, Clark Waddoups, Jonathan O. Hafen, Justin P. Matkin : Brief of Appellee

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| SUSAN I. MOSS and JAMAL S. YANAKI,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>PARR WADDOUPS BROWN GEE & LOVELESS; CLARK WADDOUPS; JONATHAN O. HAFEN; JUSTIN P. MATKIN; and JOHN DOES I through XX,<br><br>Defendants/Appellees. | Court of Appeals No. 20090158<br><br>Appeal from<br>Dismissal of Counts II Through VII of the First Amended Complaint<br><br>Third District Court No. 050913371<br>Honorable Douglas L. Cornaby |

# BRIEF OF APPELLEES


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ORAL ARGUMENT REQUESTED

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Plaintiffs filed this suit seeking millions of dollars in damages based on Parr, Waddoups, Brown, Gee & Loveless' (the "Parr Law Firm")[1] communications and actions in representing its client against one of the plaintiffs in a lawsuit that settled years ago. Specifically, plaintiffs have sued the Parr Law Firm for various torts based on the Parr Law Firm's obtaining and implementing a discovery order necessary to preserve critical evidence for its client.

**Issue 1**: Did the district court properly dismiss the plaintiffs' tort claims based on the application of the judicial proceedings privilege where the Parr Law Firm's communications and actions were all made in the course of the underlying litigation and were based upon orders of the court? (R. 231-35; 354-57.)

**Standard of Review**: This Court reviews the granting of a motion for judgment on the pleadings under Rule 12(c) of the Utah Rules of Civil Procedure for correctness. Thimmes v. Utah State Univ., 2001 UT App 93, ¶ 4, 22 P.3d 257. When considering a 12(c) motion, however, the Court must accept the factual allegations of the complaint, but "[l]egal conclusions, deductions, and opinions couched as facts, are . . . not presumed to be true." Jensen v. Reeves, 45 F. Supp. 2d 1265, 1270 (D. Utah 1999); see also Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10th Cir. 1989) ("well-pleaded facts, as distinguished from conclusory allegations, must be taken as true").

**Issue 2**: Did the district court properly dismiss the plaintiffs' tort claims based on the application of the First Amendment privilege where the Parr Law Firm's communications and actions were all made on behalf of a client as part of the petitioning process to the government to redress a grievance? (R. 231-35; 354-57.)

[1] The Parr Law Firm is now known as Parr Brown Gee & Loveless.

**Standard of Review**: The same as issue 1.

**Issue 3**: Did the district court properly dismiss the plaintiffs' tort claims based on its determination that the discovery order issued by the district court was not unlawful and that the plaintiffs were collaterally estopped from challenging the order? (R. 350-54.)

**Standard of Review**: The same as issue 1.

**Issue 4**: Did the district court properly dismiss the plaintiffs' tort claims based on the plaintiffs' failure to adequately plead all elements of each claim? (R. 235-40; 358-59.)

**Standard of Review**: The same as issue 1.

## STATUTES IMPORTANT TO THE APPEAL

Not applicable.

## STATEMENT OF THE CASE

### I. NATURE AND COURSE OF PROCEEDINGS

Plaintiffs Susan I. Moss and Jamal S. Yanaki ("plaintiffs") filed this case against defendants Parr, Waddoups, Brown, Gee & Loveless and several of its lawyers (hereinafter collectively the "Parr Law Firm") in 2005. (R. 1-39.) All of plaintiffs' claims in this case arise out of the Parr Law Firm's representation of a client, Iomed, Inc., in an earlier lawsuit filed against Mr. Yanaki for misappropriating trade secrets in an effort to unlawfully compete (the "Iomed case"). (R. 41-72; 129-44.) The Iomed case was settled in 2005. (R. 465.)

In their Amended Complaint in this case, Ms. Moss and Mr. Yanaki asserted seven causes of action against the Parr Law Firm related to the Parr Law Firm's representation of Iomed. (R. 129-44.) Count I of the Amended Complaint was for breach of a settlement agreement allegedly entered into between the Parr Law Firm and the plaintiffs in the Iomed case. (R. 138-39.) Counts II through VII of the Amended Complaint were

pled in the alternative to Count I and are all tort claims arising out of Iomed's seizure of computer-stored information and other documents from Mr. Yanaki pursuant to an order issued by the district court in the Iomed case. (R. 129-44.)

Following the filing of an answer, the Parr Law Firm moved for dismissal of Counts II through VII of the Amended Complaint under Rule 12(c) of the Utah Rules of Civil Procedure. (R. 223-81; 347-98.) In support of its motion, the Parr Law Firm made the following arguments:

- Counts II through VII should be dismissed because each of them is based on acts and statements made by the Parr Law Firm as counsel in the Iomed case. As a result, each of the claims is barred by the judicial proceedings privilege, and each is barred by the rights of litigants and their counsel under the First Amendment to the United States Constitution to petition the government for the redress of grievances. (R. 231-35; 354-57.)
- Counts II through VII should be dismissed because each of them is based on the argument that the Discovery Order (defined hereinafter) was unlawful. Not only was the Discovery Order not unlawful, but plaintiffs are barred under the doctrine of collateral estoppel from challenging the Discovery Order because they failed to do so in the Iomed case. (R. 350-54.)
- Counts II through VII should be dismissed because each of them fails to plead necessary elements of the cause of action. (R. 235-40; 358-59.)

A hearing on the motion for judgment on the pleadings was held before the district court on February 15, 2007.[2] (R. 465.) On March 20, 2007, the court issued a ruling on the motion. In its ruling, the district court held:

> This case centers around a discovery order issued by the court in the first action. Parr Waddoups received a discovery order allowing

[2] This case was originally assigned to Judge Leslie A. Lewis and was subsequently reassigned to Judge Douglas L. Cornaby, who issued the ruling that is the subject of this appeal. Later, the case was reassigned to Judge Joseph Fratto.

> them to go into Yanaki's home and take information from his computer. The order was issued by a district court judge. The Petitioners claim this was a search and seizure under the criminal law and not a valid discovery order under the civil law.
>
> If Plaintiffs' position is accepted, then there could be no real discovery in a civil action of this nature. Iomed would have to give advance notice of the material to be discovered. If Yanaki had indeed stolen trade secrets and they were on his computer, he would have ample opportunity to hide the material or destroy it. There is little reason to suppose that a person who would steal such things would not hide or destroy them to avoid being found out.
>
> * * * *
>
> The Plaintiff, Yanaki, should have objected to the supposed illegality of the discovery order in the initial Iomed case wherein he was sued. He never pressed an objection to that order. He settled the case so there was no appeal. It is, therefore, presumed that the discovery order was valid. . . . He had an obligation to challenge the order if he felt it was illegal or even improperly issued, especially since Iomed's case depended upon it. The Plaintiffs are collaterally estopped from pursuing this claim.
>
> * * * *
>
> This Court must also recognize the Defendants' right to petition government. The parties to a lawsuit are subject to the doctrine of judicial privilege. The judicial proceedings privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." Beezley v. Hansen, 4 Utah 2d 64, 286 P.2d 1057 (1955).

(R. 465-68.) On or about May 7, 2007, the court entered judgment on the dismissal of Counts II through VII of the Amended Complaint. (R. 476-78.)

On January 25, 2007, the Parr Law Firm filed a motion for summary judgment on Count I of the Amended Complaint. (R. 429.) On August 20, 2007, the district court issued a Memorandum Decision denying the motion, and on September 17, 2007, it entered its order denying summary judgment. (R. 495, 501.) On appeal, this Court reversed the denial of summary judgment in Moss v. Parr Waddoups Brown Gee & Loveless, 2008 UT App 405, 197 P.3d 659. No appeal was taken from that decision and

the dismissal of Count I is not the subject of this appeal. The district court entered a final judgment on all claims on February 18, 2009. (R. 676-78.)

## II. STATEMENT OF THE FACTS

On April 9, 2002, Iomed, Inc. ("Iomed") filed a complaint in the Third District Court, Salt Lake County, Case No. 020903031 (the "Iomed Case"), against its former employee, Jamal Yanaki, and others. (R. 130.) Iomed alleged that Mr. Yanaki had misappropriated proprietary information about an invention and that Mr. Yanaki was poised to open a competing business. (R. 41-72.) Iomed was represented by the Parr Law Firm in that case, and the case was assigned to Judge Tyrone E. Medley. (R. 130.)

At the outset of the Iomed Case, the Parr Law Firm obtained two ex parte discovery orders from Judge Medley that authorized the seizure of certain electronically stored data and other records maintained at the home office of Mr. Yanaki and Ms. Moss, in order to preserve critical evidence. (R. 106-09, 111-12, 130-31.) These orders are referred to collectively herein as the "Discovery Order." The Discovery Order was issued pursuant to Iomed's motion, memorandum and affidavits, all of which showed that Mr. Yanaki had removed trade secrets from Iomed, that he intended to compete with Iomed using this information, and that there was a risk of destruction because the evidence was stored on Mr. Yanaki's computer. (R. 130-31; 187-218). According to the Amended Complaint, the Discovery Order had the ostensible legal purpose to protect trade secrets and conduct discovery, but was really intended to send a "message" to Iomed's employees that they should sign non-compete agreements. (R. 131.)

The Discovery Order directed the Salt Lake County Sheriff's Office, or other appropriate law officials, with the assistance of Iomed, to take custody of certain electronic files maintained at the residence of plaintiffs. The Discovery Order authorized Iomed to copy the files and return the copies to Mr. Yanaki and to file the originals with the court under seal. Finally, the Discovery Order allowed counsel for Mr. Yanaki to

review the electronic files and make objections before they would be made available to Iomed's counsel and experts. (R. 106-09, 111-12.)

According to the Amended Complaint, on the morning of April 15, 2002, defendant Matkin and a Salt Lake County Deputy Sheriff rang the doorbell of the plaintiffs' home. Mr. Yanaki was out of town at the time, but Ms. Moss answered the door. (R. 133.) The officer handed Ms. Moss a summons, a complaint, and a copy of the Discovery Order authorizing the seizure of documents relating to Iomed's claim of misappropriation. (R. 133.) Ms. Moss declined to allow Mr. Matkin and the officer in the home in Mr. Yanaki's absence. (R. 134.) Mr. Matkin told Ms. Moss he intended to obtain a further court order and left. (R. 134.) Mr. Matkin obtained a second order from Judge Medley denominated "Supplemental Order in Aid of Enforcement," which authorized use of reasonable force to enter the house and seize the relevant records. (R. 134-35.) Mr. Matkin then returned with the Supplemental Order, and Ms. Moss allowed Mr. Matkin, the officer, and others into the home to execute the Discovery Order. Subsequently, Mr. Yanaki's computer hard drive and additional documents were deposited with the Court, in accordance with the Discovery Order. (R. 136-37.)

While the Iomed Case was pending, Mr. Yanaki and Ms. Moss filed a lawsuit against the Parr Law Firm and others in the United States District Court for the District of Utah alleging civil rights violations arising from the seizure of evidence pursuant to the district court's Discovery Order. (R. 137-38.) That case, hereinafter referred to as the "Federal Civil Rights Case," was eventually dismissed because the federal court did not find a Section 1983 violation and declined to hear the state law claims. (Id.; See Yanaki v. Iomed, Inc., 319 F. Supp. 2d 1261 (D. Utah 2004), aff'd, 415 F.3d 1204 (10th Cir. 2005), cert. denied, 547 U.S. 1111 (2006).)

Plaintiffs served their Complaint in the present lawsuit in December 2005, about 20 months after the dismissal of the Federal Civil Rights Case, and about four months after the complete settlement of the Iomed case. (R. 128.) In Counts II through VII of the

Amended Complaint, the plaintiffs pled the following tort claims arising out of the Parr Law Firm's obtaining and implementing the Discovery Order: abuse of process, invasion of privacy, intentional infliction of emotional distress, trespass to land and chattel, conversion, and civil conspiracy (collectively referred to herein as plaintiffs' "tort claims").

## SUMMARY OF THE ARGUMENT

The bone of contention in this case is whether plaintiffs can sue a law firm for representing a client and acting in accordance with court orders in another civil case, which has now been settled. Reduced to its essentials, the allegedly tortious act described in the Amended Complaint is this: on behalf of their client, the Parr Law Firm obtained and implemented the Discovery Order issued by the district court to prevent plaintiffs' destruction of crucial evidence. The district court correctly held that the Parr Law Firm's conduct in obtaining and implementing the Discovery Order was privileged under the judicial proceedings and First Amendment privileges. These privileges protect the statements and conduct of lawyers, litigants, witnesses, judges, and jurors in the litigation process. These privileges are absolute and insulate attorneys for actions specifically authorized by the courts before which they appear.

Plaintiffs' tort claims also fail for the independent reason that the Discovery Order was lawful; the district court was not obligated to assume the Discovery Order was unlawful simply because the Amended Complaint later stated it was unlawful. Beyond that, the plaintiffs are estopped from now arguing that the Discovery Order was unlawful because they did not dispute the entry of the order at the time, nor did they take an appeal from its entry. The district court correctly held that the Discovery Order was not unlawful, but instead was reasonable and necessary to preserve evidence.

Finally, each of plaintiffs' tort claims fail as a matter of law because the plaintiffs failed to allege facts sufficient to support their claims. For all of these reasons, the district court properly dismissed Counts II through IV of the First Amended Complaint.

## ARGUMENT

## I. THE JUDICIAL PROCEEDINGS PRIVILEGE BARS THE PLAINTIFFS' TORT CLAIMS.

The lower court correctly held that the judicial proceedings privilege bars all of the plaintiffs' tort claims in this case. The Utah Supreme Court has held that the privilege protects communications "(1) made during or in the course of a judicial proceeding; (2) hav[ing] some reference to the subject matter of the proceeding; and (3) . . . made by someone acting in the capacity of judge, juror, witness, litigant, or counsel." Riddle v. Perry, 2002 UT 10, ¶ 13, 40 P.3d 1128 (quoting DeBry v. Godbe, 1999 UT 111, ¶ 11, 992 P.2d 979).[3] Plaintiffs' tort claims are barred in this action because they all stem from the Discovery Order obtained in the "course of a judicial proceeding;" the Discovery Order unquestionably makes "reference to the subject matter of the proceeding;" and the Discovery Order was obtained by counsel in the action. The circumstances under which the Discovery Order arose and was executed meet the requirements for the application of the privilege.[4]

Despite their recognition that the privilege is absolute and that it is meant to provide protection to institutional actors in the course of litigation, plaintiffs make two primary arguments against the lower court's application of the judicial privilege in this case. First, plaintiffs claim the privilege should not have been applied at the pleadings stage of the case. Second, plaintiffs claim that the privilege only extends to "communications-based" claims, and that it does not apply to "actions" taken by attorneys. For the following reasons, these arguments are contrary to the law.

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[3] If the privilege applies, it protects participants at "every step in the proceeding until final disposition," including during the discovery phase of a case. DeBry, 1999 UT 111, ¶ 14 (internal citations omitted).

[4] In their opening brief, plaintiffs state that they "have no quarrel with the general propositions that a privilege exists to make defamatory statements in litigation, that the privilege is absolute, that it protects witnesses, lawyers, parties and judges from liability for making defamatory statements or that the privilege lasts throughout the entire litigation . . .." (Opening Brief, at n.8.)

### A. The Judicial Proceedings Privilege Is Absolute and Is Appropriately Applied at the Pleading Stage of the Litigation.

The judicial proceedings privilege is "absolute," Beezley v. Hansen, 286 P.2d 1057, 1058 (Utah 1955), meaning that it is "'justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'" Rolon v. Henneman, 517 F.3d 140, 145 (2d Cir. 2008) (citing Forrester v. White, 484 U.S. 219, 227 (1988)). While plaintiffs do not dispute that it is an absolute privilege, they claim that the judge erred in applying the judicial proceedings privilege at the pleading stage of this litigation.[5] In other words, plaintiffs argue that they should have been allowed to proceed through discovery before the privilege could be applied. Plaintiffs, however, did not argue below and do not now give any explanation as to what discovery would change the application of the privilege in this case.

Courts recognize that immunity from suit provides protection from the rigors of discovery, not just from liability. Wallin v. Norman, 317 F.3d 558, 563 (6th Cir. 2003) (holding that qualified immunity for public officials extends to protections from "unnecessary and burdensome discovery or trial proceedings" (citing Crawford-El v. Britton, 523 U.S. 574, 597-98 (1998)). "[T]rial courts should rule as early as possible on

[5] Plaintiffs cite Zoumadakis v. Uintah Basin Medical Center, Inc., 2005 UT App 325, 122 P.3d 891, for the proposition that the court erred in ruling on the pleadings based on an affirmative defense. (Opening Brief, at 19-20.) Zoumadakis is distinguishable. In Zoumadakis, the Court of Appeals held that the district court erred in granting a motion to dismiss for failure to state a defamation claim based on the affirmative defense of a qualified immunity privilege. 2005 UT App 325, ¶ 7. In a defamation case, the plaintiff initially has the burden of setting forth "'the language complained of . . . in words or words to that effect.'" Id. ¶ 3 (citing Williams v. State Farm Ins. Co., 656 P.2d 966, 970 (Utah 1982)). If the defendant alleges a qualified privilege as an affirmative defense, the burden shifts "to the plaintiff to show the inapplicability of a qualified privilege." Id. ¶ 6. Given the burden shifting unique to defamation cases, the plaintiff is not required to anticipate the affirmative defense of a qualified privilege in its initial complaint to survive a motion to dismiss. Id. As Zoumadakis evinces, both a claim of defamation and an affirmative defense of a qualified privilege are fact intensive. In contrast, because the affirmative defenses here are absolute and not contingent on proving particular facts, they are an appropriate basis for a judgment on the pleadings.

the existence of an absolute privilege," because "'[t]he essence of an immunity from suit is an entitlement not to stand trial or face the other burdens of litigation.'" Marsh v. Hollander, 339 F. Supp. 2d 1, 7 (D.D.C. 2004) (citing Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 340 (D.C. 2001)). If the judicial proceedings privilege attached only after extensive discovery on the application of the privilege, its policy purpose would be compromised. Speech would still be chilled — in contravention of the clear policy purpose of the judicial proceedings privilege — if the privilege only attached after extensive discovery. "'These absolute privileges are based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action.'" Finkelstein, 774 A.2d at 340 n. 8 (citing RESTATEMENT (SECOND) OF TORTS, Ch. 25, Title B, at 243)).

In fact, courts routinely dismiss claims, such as those brought by plaintiffs, on the pleadings based on the absolute immunity of the judicial proceedings privilege. See Riddle, 2002 UT 10, ¶¶ 1, 7 (affirming the lower court's dismissal of a defamation case on the pleadings because the legislative proceedings privilege, like the judicial proceedings privilege, is absolute); Rolon, 517 F.3d at 142, 146-47 (affirming a judgment on the pleadings in favor of the defendants based on the absolute immunity of the judicial proceedings privilege); Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP, 175 F.3d 14, 15-16 (1st Cir. 1999) (affirming the lower court's dismissal of defamation and legal malpractice claims because the claims were barred by the absolute judicial proceedings privilege); Lambdin Funeral Serv., Inc. v. Griffith, 559 S.W.2d 791,791-92 (Tenn. 1978) (affirming the lower court's dismissal for failure to state a claim because the judicial proceedings privilege is absolute); Brown v. Delaware Valley Transplant Program, 539 A.2d 1372, 1373-75 (Pa. Super. Ct. 1988) (upholding dismissal of claims

against hospital attorney based on judicial proceedings privilege). Accordingly, the district court appropriately applied the judicial proceedings privilege at the pleading stage of the litigation.

### B. The Judicial Proceedings Privilege Applies to All of Plaintiffs' Tort Claims.

Plaintiffs concede that the judicial proceedings privilege covers the Parr Law Firm's filings with the court and its arguments in front of the court on the Discovery Order, but they contend that the privilege does not extend to the actual execution of the Discovery Order. (See Opening Brief, at n.8.) In other words, they argue that the privilege only applies to "communication-based claims." (Id. at 35.) Plaintiffs' position, however, is contrary to clear case law and the policy implications that support the law. The court cannot divorce the protections afforded the statements that supported the Discovery Order from the execution of the order; black letter law articulating the judicial proceedings privilege rejects such a narrow construction.

#### *1. The judicial proceedings privilege extends to any tort arising out of an attorneys' participation in a judicial proceeding.*

Despite plaintiffs' arguments to the contrary, the judicial proceedings privilege extends to court-sanctioned actions throughout the course of the proceeding, DeBry, 1999 UT 111, ¶ 14, and bars "*all claims* arising from the same statements" made during judicial proceedings. Id. ¶ 25 (internal citations omitted). The Utah Supreme Court has held that the judicial privilege is designed "to ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions." Price v. Armour, 949 P.2d 1251, 1258 (Utah 1997). Under this broad mandate, absolute privileges "extend . . . to persons whose special position or status required that they be as free as possible from fear that their actions in their position might subject them to legal action." O'Connor v.

Burningham, 2007 UT 58, ¶ 29, 165 P.3d 1214 (internal citations omitted).[6] If a question arises about whether the facts of a case fall within the judicial proceedings privilege, the question should be resolved in favor of the application of the privilege. See Pratt v. Nelson, 2007 UT 41, ¶ 30, 164 P.3d 366 ("[I]f doubt as to [the] relevancy" of the statement under the second prong "exists, it should be resolved in favor of the statement having reference to the subject matter of the proceeding." (internal citations omitted)).

Because the judicial proceedings privilege is absolute, it applies to all tort claims based on the defendant's participation in a judicial proceeding, not just communication-based claims such as defamation. See Price, 949 P.2d at 1258 (Utah 1997) (barring a claim for intentional interference with business relations under the judicial proceedings privilege); see also DeBry, 1999 UT 111, ¶ 25 (holding that the judicial proceedings privilege barred a claim for intentional infliction of emotional distress).[7] Without such sweeping protection against "all claims arising from the same allegedly defamatory statements," the threat of litigation threatens to inhibit "[p]articipation in a judicial proceeding." Price, 949 P.2d 1251 at 1258; see also DeBry, 1999 UT 111, ¶ 25 ("the judicial proceeding privilege extends not only to defamation claims but to all claims arising from the same statements" (internal citations omitted)).

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[6] The absolute immunity afforded under the judicial proceedings privilege even extends to false statements. The Utah Supreme Court has explicitly stated that "[i]t is not inimical to" the objective of integrity within a judicial proceeding "that speakers may express false statements, even those uttered with ill motives, within judicial proceedings free of the risk that tort will hold them to account. The system achieves a satisfactory measure of confidence that the search for truth has been fruitful when all who claim to possess part of or the entire truth may freely disclose the basis of that claim." O'Connor, 2007 UT 58, ¶ 30.

[7] Although here plaintiffs appear to be primarily contesting the application of the judicial proceedings privilege to their abuse of process claim, the rationale behind the privilege extends to all of the torts they brought against defendants. For instance, allowing a tort claim for conspiracy to proceed against an attorney based on conversations with her client would detrimentally interfere with the attorney's ability "to freely speak with her client" and function in her capacity as an officer of the court. P.J., ex rel. Jensen v. Utah, 2008 WL 4372933, *12 (D. Utah, Sept. 22, 2008).

Of particular concern to the appellant appears to be the application of the judicial proceedings privilege to an abuse of process claim. Courts, however, have routinely held that the privilege applies to abuse of process claims. For example, in Rusheen v. Cohen, 128 P.3d 713 (Cal. 2006), the California Supreme Court considered whether the litigation privilege should bar an abuse of process claim. Id. at 715. Similar to Utah law, under California law, an abuse of process claim requires a showing that the defendant "(1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." Id. at 718. California codified its common law litigation privilege, but otherwise its elements are similar to Utah's judicial proceedings privilege. Id. at 718. The application of the privilege requires a showing that the communication was "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objections of the litigation; and (4) that have some connection or logical relation to the action." Id. In balancing an abuse of process tort against the litigation privilege, the court determined that "where the gravamen of the complaint is a privileged communication . . . the privilege extends to necessarily related noncommunicative acts . . ." and thus bars an abuse of process claim. Id. at 722.

The Rusheen court held that barring abuse of process torts when the physical action arises directly from a privileged communication is necessary to ensure "litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation." Id. at 722.[8] Notably, the court held that applying abuse of process liability to actions arising out of judicial proceedings would threaten "the goal of finality of judgments" by creating another round of litigation on underlying actions that

[8] The court acknowledged that the expansion of the litigation privilege could necessarily limit the abuse of process tort but held that the policy preference of unfettered access to the courts predominated. Id. at 722.

had already been decided. Id. at 723. The court also held that because the physical actions at issue – the enforcement of a judgment – arose directly out of a judicial proceeding, the plaintiffs had other means of redress. Id. at 723-24; see also Hatch v. Davis, 2006 UT 44, ¶ 40, 147 P.3d 383 (noting that an abuse of process claim can only proceed if the plaintiffs have no opportunity for redress "within the litigation forum itself").

Other courts have followed similar reasoning and applied the judicial proceedings privilege to abuse of process claims. For example, in Field v. Kearns, 682 A.2d 148 (Conn. App. Ct. 1996), the Appellate Court of Connecticut extended absolute immunity barring an abuse of process claim arising out of the defendant's filing of a bar grievance claim against another lawyer. Id. at 149. The court recognized that the potential harm caused "to an attorney's reputation and career from groundless complaints is great" but established absolute immunity for the filing of bar grievances anyway because of the concern that the specter of "retaliatory lawsuits . . . would have a chilling effect" and "reduce the bar's effectiveness in policing its own ranks." Id. at 153 (internal citations omitted). Similarly, in Netterville v. Lear Siegler, Inc., 397 So. 2d 1109, 1110 (Miss. 1981), the court extended absolute immunity to an attorney who purportedly abused the judicial process by filing a bar complaint against another attorney to gain an advantage in a products liability suit. The court held that under Mississippi common law, absolute immunity applies in the face of abuse of process claims "so long as the statements made or documents filed are reasonably related to the judicial inquiry." Id. at 1112.

In addition to abuse of process claims, other jurisdictions similarly apply the judicial proceedings privilege to bar a wide range of tort claims. See, e.g., Lambdin Funeral Serv., Inc., 559 S.W.2d at 792 (invasion of privacy); Middlesex Concrete Prods. and Excavating Corp. v. Carteret Indus. Ass'n, 172 A.2d 22, 25 (N.J. Super. Ct. App. Div. 1961) (tortious interference); Silberg v. Anderson, 786 P.2d 365, 370-73 (Cal. 1990) (intentional infliction of emotional distress); Thornton v. Rhoden, 53 Cal. Rptr. 706, 716-

19 (Cal. Dist. Ct. App. 1966) (abuse of process based on discovery allegedly conducted for improper purposes); Hugel, 175 F.3d at 17-18 (legal malpractice).

The same policies behind a liberal application of the privilege articulated by Utah courts have been articulated by other jurisdictions as well. The First Circuit Court of Appeals, for instance, held that "all doubts are to be resolved in favor of pertinency and application of the privilege." Hugel, 175 F.3d at 16. In Silberg, the California Supreme Court stated that "[t]he principal purpose of . . . [the judicial proceedings privilege] is to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. . . . [The privilege] further promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests." 786 P.2d at 369-370.

*2. The judicial proceedings privilege protects conduct as well as communications.*

The judicial proceedings privilege extends not only to communications, but also to physical actions taken as a result of statements made in judicial proceedings. In Clodgo by Clodgo v. Bowman, 601 A.2d 342 (Pa. Super. Ct. 1992), for instance, the court held that the judicial proceedings privilege barred a medical malpractice action against a physician for incorrectly conducting paternity testing and certifying the incorrect testing to the court in the form of a medical opinion letter. Id. at 343-44. The plaintiff attempted to reinstate the paternity suit after the error was discovered, but the suit was dismissed on *res judicata* grounds and the appeal was denied. Id. at 344.

The Clodgo court considered the same question at issue here: "whether the absolute testimonial privilege for communications made in connection with judicial proceedings" extends to conduct in addition to communications. Id. at 344. The court held that "[r]egardless of the tort contained in the complaint, if the communication was made in connection with a judicial proceeding and was material and relevant to it, the privilege applies." Id. at 345. The defendant's physical act of running the paternity test

did not alter the application of the privilege to a medical malpractice claim. Id. Despite the compelling facts of the plaintiff's case, policy considerations were determinative. Id. The court held that liability "simply cannot be allowed as the privilege is necessary to prevent witnesses from refusing to testify based on a fear of potential civil liability." Id. at 345.

Likewise, in Rusheen, the California Supreme Court held that actions taken to execute a judgment, including a "levy on the judgment debtor's property," were immune from a claim for abuse of process where the attorney had allegedly obtained the default judgment by filing a false declaration of service. 128 P.3d at 715. The court reasoned that the gravamen of the complaint was the filing of the false affidavit, and that a levy on the assets was an outgrowth of that privileged communication. Id. at 722.[9]

The gravamen of plaintiffs' complaint here is that the defendants improperly executed what plaintiffs characterize as an illegal search warrant. The filing of the discovery motion by the Parr Law Firm was a privileged communicative act from which the execution of the Discovery Order directly flowed. Indeed, only one of the three individual defendants participated in the execution of the Discovery Order at all. As the Rusheen court reasoned, "[S]ince a party may not be liable for submitting false . . . evidence in the course of judicial proceedings which are used to obtain a judgment, the

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[9] Despite plaintiffs' contention otherwise, Brown v. Delaware Valley Transplant Program, 539 A.2d 1372 (Pa. Super. Ct. 1988), is also on point. In Brown, the plaintiffs made precisely the same argument that plaintiffs make here and it was rejected by the court. In Brown, the attorney for a hospital was sued for obtaining a court order to allow the hospital to extract organs from a brain-dead man for transplantation. The plaintiffs alleged that the lawyer obtained the order unlawfully without notifying the next-of-kin and sued for mutilation of the corpse and assault and battery. The appellate court affirmed the lower court's ruling that the attorney was protected from tort liability by the judicial proceedings privilege and in doing so rejected the plaintiff's argument that the privilege did not extend to "intentionally tortuous behavior." Id. at 1374-75. The court reasoned that the privilege protects attorneys from liability for actions that stem from "pertinent communication[s] . . . undertaken in connection with representation of a client in a judicial proceeding." Id. at 1375.

party should likewise be immune from abuse of process claims for subsequent acts necessary to enforce it. Otherwise, application of the litigation privilege would be thwarted." 128 P.3d at 722.

The judicial proceedings privilege specifically precludes claims like those presented by plaintiffs here based on allegations that attorneys conducted improper discovery with police assistance and obtained unlawful court orders. In Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045 (9th Cir. 1982), for instance, Forro alleged that IBM, accompanied by police, conducted an unlawful search of the plaintiff's business premises in search of evidence that the plaintiff had misappropriated trade secrets. Id. at 1051. Forro asserted claims for antitrust violations and intentional interference with business relationships based on allegations that IBM was "a puppeteer directing the actions of the police," in order to "subject the company to a 'thunderclap' of adverse publicity." Id. at 1051, 1053. The Ninth Circuit held that IBM's "communications to the authorities and participation in the search were privileged" under the judicial proceedings privilege. Id. at 1051-52 (emphasis added). Notably, the court rejected Forro's claim that the judicial proceedings privilege did not apply because IBM was acting entirely with an ulterior motive. Id. at 1056 ("The absolute privilege is not defeated . . . by the communicant's ulterior motives").[10]

*3. The policy of the law supports the application of the judicial proceedings privilege in this case.*

The law set forth above and the supporting policy considerations support the application of the privilege to the Parr Law Firm's statements as well as to the actions they took to implement the Discovery Order according to its terms. Application of the judicial proceedings privilege in the present case would be thwarted if it did not extend to

[10] Plaintiffs argue that Forro does not support the defendants' position because in Forro, the "request for the search warrant was valid and the request from the police for assistance was reasonable" and consequently the judicial proceedings privilege was appropriately applied. (Opening Brief, at 33.) We address plaintiffs' contention that the underlying Discovery Order in this case was illegal below. (See infra pp. 21-31.)

the actions authorized by the district court's Discovery Order. That is why "modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit." Rusheen, 128 P.3d at 723 (emphasis added); see also Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) ("In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding" and that "[t]he rational behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding.").

Defendants Waddoups and Hafen did nothing more than prepare moving papers to present to the district court and defendant Matkin did only what the district court specifically authorized in the Discovery Order. Utah has long recognized an absolute privilege for written and oral statements by attorneys in the conduct of litigation. A necessary corollary is that attorneys must likewise be free to take action that is specifically authorized by the courts before which they appear. This is particularly true in the discovery context, where attorneys must frequently take some physical actions to comply with the court's orders (i.e., examine documents at the opposing party's offices, review personal and potentially embarrassing email, or even arrange for service of process).

If attorneys were subject to liability in subsequent litigation for taking judicially authorized action, they would be inhibited from zealously representing their clients, thereby frustrating one of the fundamental purposes of the privilege. It would defeat the purpose of the privilege for the defendants to enjoy an absolute privilege for filing the discovery motion with the district court (which they unquestionably do), but to be denied protection in carrying out the resulting order. Such a ruling would undermine the effective operation of the judicial system. See, DeBry, 992 P.2d at 984-85 ("The interest

of justice as well as the integrity of the judicial process is ill-served if an officer of the court experiences intimidation . . . because of her role in a judicial proceeding." (internal citations omitted)); Beezley, 286 P.2d at 1058 (The judicial proceedings privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." (internal citations omitted)).

## II. CONSTITUTIONAL PROTECTIONS UNDER THE FIRST AMENDMENT RIGHT TO PETITION ALSO BAR PLAINTIFFS' TORT CLAIMS.

The First Amendment right "to petition the Government for a redress of grievances" provides an independent bar to plaintiffs' tort claims. The constitutional right to petition "bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally-protected petitioning activity." Gen-Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948, 956 (S.D. Cal. 1996) (emphasis added). Although case law about the right to petition was developed primarily in the antitrust arena, "the constitutional protection of the right to petition is no less compelling in the context of common-law tort claims," like abuse of process actions. See Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1237 (R.I. 1996) (indicating that the Noerr-Pennington doctrine can bar claims for abuse of process); see also Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 26, 116 P.3d 323 (describing the application of the Noerr-Pennington doctrine to bar tort claims that interfere with the right to petition).

Like the judicial proceedings privilege, this prohibition arises out of a policy concern that "tort liability for abuse of process . . . would infringe or chill [the defendant's] First Amendment right to petition the courts for redress of grievances." Scott v. Hern, 216 F.3d 897, 914 (10th Cir. 2000); Gen-Probe, Inc., 926 F.Supp. at 955 (recognizing that the "Ninth Circuit set up a heightened pleading standard for claims based upon petitioning activity because of the risk that frivolous claims could have a chilling effect on the exercise of First Amendment rights.").

The privilege applies even when the petitioning party is motivated by an improper purpose. In articulating the right to petition, the Supreme Court stated that "'[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.'" Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 58 (1993) (citing E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961)); id. at 57 (holding that immunity under the right to petition still applies even when the petitioner's "sole purpose . . . was to destroy [their] competitors" (citing Noerr, 365 U.S. at 138)).

This Court should assume that the constitutional protections of the First Amendment apply unless the actual petition constitutes a "sham." Prof'l Real Estate Investors, Inc., 508 U.S. at 56; see also Anderson Dev. Co., 2005 UT 36, ¶ 27 ("[U]nder the sham exception, an individual will be liable if he uses the governmental *process*-as opposed to the *outcome* of that process-as a weapon" (internal citations omitted)). A court proceeding only constitutes a "sham" if first it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Prof'l Real Estate Investors, Inc., 508 U.S. at 60. Only if the suit is "objectively meritless" should the court next consider whether it is driven by subjective bad faith. Id. at 60. The implication of the Supreme Court's two-pronged test is that "a finding that the lawsuit is not objectively baseless precludes liability regardless of improper motive." Gen-Probe, Inc., 926 F. Supp. at 957.

On the face of the pleadings, plaintiffs cannot establish that the Parr Law Firm's filings in support of the Discovery Order were a "sham" under the Supreme Court's articulation of the test. The very fact that the district court granted the Discovery Order prepared by the Parr Law Firm indicates that the order had sufficient substance to avoid being categorized as "objectively baseless" under the first prong of the analysis. See Cove Rd. Dev., 674 A.2d at 1239 (holding that the court's refusal to dismiss the

defendant's claim was sufficient evidence to prove that the underlying action was not "objectively baseless"). Even assuming the ulterior motive plaintiffs attribute to Iomed, plaintiffs have not alleged, and could not plausibly allege, that there was no cognizable basis for Iomed's trade secrets claim or that the Discovery Order at issue was not reasonably designed to preserve the evidence needed to adjudicate that claim.

Because plaintiffs cannot allege that Iomed's trade secrets misappropriation action against Mr. Yanaki was a "sham," the First Amendment protects the Parr Law Firm from tort liability for actions that have as their "gravamen constitutionally-protected petitioning activity." Gen-Probe, Inc., 926 F. Supp. at 956 (emphasis added). Without question, the court-ordered search of Mr. Yanaki's home arose directly from constitutionally-protected petitioning activity: namely, the defendants' filings for discovery on behalf of their client, Iomed. It follows that the First Amendment right to petition constitutes an independent bar to plaintiffs' tort claims.

## III. PLAINTIFFS' UNDERLYING TORT CLAIMS ALL FAIL AS A MATTER OF LAW BECAUSE THE DISCOVERY ORDER WAS NOT UNLAWFUL.

Even if the judicial proceeding and First Amendment privileges do not apply, each of plaintiffs' tort claims would still fail as a matter of law. The crux of each of plaintiffs' tort claims is that the Discovery Order of the district court was an "illegal search and seizure." In the Amended Complaint, as well as in their opening brief, plaintiffs do not make a fact-based challenge to the district court's decision to issue the Discovery Order (i.e., was there sufficient evidence to issue the order), but instead argue that the Discovery Order is *per se* illegal. (R. 132-33.) Plaintiffs further contend that the court must assume the illegality of the search under the procedural posture required of Rule 12(c). Both of these arguments are contrary to the law for the following reasons.

### A. The Lower Court Did Not Have to Assume that the Discovery Order Authorized an "Illegal" Search Under the Procedural Posture Required of a 12(c) Motion.

Throughout its opening brief, the appellant insists that the underlying search of Mr. Yanaki's home was "illegal" and that the lower court improperly failed to assume

this "fact" when it ruled on the defendants' 12(c) motion.[11] When considering a Rule 12(c) motion, however, the court must accept the factual allegations of the complaint, but "[l]egal conclusions, deductions, and opinions couched as facts are . . . not presumed to be true." Jensen v. Reeves, 45 F. Supp. 2d 1265, 1270 (D. Utah 1999); see also Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10th Cir. 1989) ("well-pleaded facts, as distinguished from conclusory allegations, must be taken as true"); 5C Federal Practice & Procedure § 1368 ("Although the moving party, for purposes of the Rule 12(c) motion, concedes the accuracy of the factual allegations in his adversary's pleading, he does not admit other assertions in the opposing party's pleading that constitute conclusions of law, legally impossible facts, or matters that would not be admissible in evidence at trial.").

Instead of making an improper factual determination, the district court simply rejected the *legal* premise of the plaintiffs' argument that the Discovery Order was *per se* illegal. The lower court stated, "[t]he Petitioners claim this was a search and seizure under the criminal law and not a valid discovery order under the civil law. If Plaintiff's position is accepted, then there could be no real discovery in a civil action of this nature." (R. 466.) The plaintiffs' assertion that the underlying search was illegal is not a fact, but instead a legal characterization. To prevail on a judgment on the pleadings, the moving party does not have to assume that incorrect legal conclusions are facts. Jensen, 45 F. Supp. 2d at 1270. The plaintiffs did not challenge the sufficiency of the evidence that led to the issuance of the Discovery Order, nor do they allege that the Parr Law Firm exceeded the scope of the order. Instead, plaintiffs make a blanket argument that a

[11] For instance, the plaintiffs state that "[a]t the time [the defendants] caused such Search Motion to be filed, defendants knew that the relief they sought was illegal under both the Constitutions of the State of Utah and of the United States." (Opening Brief, at 6.) The plaintiffs claim that the Writ of Assistance "constituted a legal process that, under both the Constitutions of the State of Utah and the United States of America, could not be lawfully used to conduct a search and seizure. (Opening Brief, at 9.) Additional references to the illegality of the purported seizure pepper the plaintiffs' brief. (See, e.g., id. at 21.)

discovery order cannot allow for the entry of a home for the seizure of evidence. The district court properly made a legal determination that such a discovery order is not unlawful. No amount of discovery would change the legal arguments about whether the Discovery Order on its face was valid.

### B. Collateral Estoppel Precludes the Plaintiffs from Now Arguing that the Discovery Order Was "Illegal."

The plaintiffs are collaterally estopped from arguing that the discovery order was illegal because they did not challenge it in the underlying Iomed trade secrets case. In granting the defendant's 12(c) motion, the lower court stated: "The Plaintiff, Yanaki, should have objected to the supposed illegality of the discovery order in the initial Iomed case wherein he was sued. He never pressed an objection to that order. He settled the case so there was no appeal. It is, therefore, presumed that the discovery order was valid .... [Yanaki] had an obligation to challenge the order if he felt it was illegal or even improperly issued, especially since Iomed's case depended on it. The Plaintiffs are collaterally estopped from pursuing this claim." (R. 467.) Without the support of any authority, the plaintiffs argue that the court erred in its collateral estoppel ruling because Mr. Yanaki had no way of challenging the underlying ex parte discovery order. (Opening Brief, at 21.) The plaintiffs also argue that the elements of collateral estoppel are factually based and cannot be applied in the context of a ruling on the pleadings. (Id.) The plaintiffs' arguments are incorrect.

There is no question that Mr. Yanaki could have objected to the Discovery Order in the Iomed trade secrets case, moved to have it quashed, sought to have any evidence obtained through the order excluded, or moved for Rule 11 sanctions against Iomed and its counsel. In fact, the Discovery Order provided Mr. Yanaki's counsel with a means to object to its terms. Paragraph 4 of the Discovery Order stated: "Yanaki or his counsel shall be allowed to review the Yanaki Electronic Files and the Iomed files upon reasonable notice to the Court and Iomed for the purpose of determining if Yanaki has objections that such files contained privileged, confidential or other information that

would not be discoverable in this action." (R. 108 (emphasis added).) The Discovery Order further provided that such a review be completed within twenty days of the lower court obtaining the ordered discovery. (Id.) Mr. Yanaki took no action to challenge the order or to object to the introduction of the evidence.

Because the plaintiffs failed to challenge the Discovery Order at the appropriate time and in front of the appropriate court, they are now legally barred from alleging that the Discovery Order was improper. In Buzzanco v. Lord Corp., 173 F. Supp. 2d 376 (W.D. Penn. 2001), plaintiffs sued the Lord Corporation, its law firm, and the sheriff for executing an ex parte writ of seizure in a trade secrets case filed by the Lord Corporation in state court. Id. at 378-79. In the federal lawsuit, plaintiffs claimed that "the search and seizure was improper because it was conducted without advance notice and went beyond the scope of both in the places that were searched and the items that were seized." Id. at 384. The court, however, rejected plaintiffs' claims, among other reasons, on the grounds that they were "collaterally estopped from pursuing this theory." Id. Specifically, the court recognized that one of the plaintiffs had brought a motion in the underlying case post-seizure regarding the seizure order and the judge had "confirmed the issuance of the writ." Id. The court held that even the family members who were not parties to the underlying state action were bound by the court's decision because they were in privity with the parties who challenged the order. Id. at 385. Finally, the court also found that the seizure order was reasonable. See id. at 385-86.

Similarly, the plaintiffs' tort claims in this action are premised on the purported illegality of the underlying Discovery Order, but this argument is improper, given Mr. Yanaki's failure to challenge the Discovery Order in the underlying action. In this case, the lower court appropriately assumed the legality of the Discovery Order, given the general principle that "one district court judge cannot overrule another district court judge of equal authority." Mascaro v. Davis, 741 P.2d 938, 946 (Utah 1987) See State v. Morgan, 527 P.2d 225, 226 (Utah 1974) ("Generally one District Judge cannot overrule

another acting District Judge having identical authority and stature."). Contrary to the plaintiffs' characterization, the district court was making a legal determination regarding collateral estoppel. See Peterson v. Peterson, 530 P.2d 821, 823 (Utah 1974) (holding that in the absence of justifying circumstances, it is inappropriate for "one district judge to vacate the orders of his colleagues"). This type of legal analysis is wholly appropriate on the pleadings because it constitutes a legal determination. Buzzanco, 173 F.Supp.2d at 378, 385 (holding, on the pleadings, that an issue was barred by collateral estoppel).

**C. The Discovery Was Lawful.**

Even if the plaintiffs had challenged the underlying Discovery Order in the appropriate forum, there was nothing wrong with the discovery sought or obtained by Iomed in the underlying case. Circumstances arise during the course of discovery in which courts allow the seizure of evidence from an individual's home in the interest of preserving that evidence. In fact, according to one commentator, in the civil context, "[t]here must be literally thousands of actions in which ex parte seizures have been authorized and have been executed without a hitch." Jules D. Zaion, Ex Parte Seizure Orders: Don't Kill the Goose That Laid the Golden Egg, 23 Colum.-VLA J.L. & Arts 181, 191 (1999). Seizure orders are particularly necessary to preserve electronic evidence because, by its nature, such electronic evidence can be readily altered, transferred or eliminated.[12] To obtain and preserve the crucial electronic evidence, the Parr Law Firm appropriately moved for entry of the Discovery Order to place the computer drives in the custody of the Court before Mr. Yanaki could have an opportunity

[12] "Computer-based records may be deleted quickly and easily . . . . This characteristic of electronic evidence offers opportunities for surreptitious concealment or destruction and often serves as the basis for requesting an ex parte order seizing computer-based records . . . As a threshold matter, evidence that a party is 'likely to take the opportunity' to conceal or destroy evidence must be shown. For example, a showing that a party has a history of concealing evidence may provide persuasive grounds for issuing an ex parte seizure order." James Wm. Moore, et al, Moore's Federal Practice § 37A.21[7] (3d ed. 1997). In the Iomed case, it is undisputed that Mr. Yanaki destroyed e-mails prior to the issuance of the Discovery Order.

to destroy or hide them. See, e.g., Lorillard Tobacco Co. v. Canstar (U.S.A.) Inc., 2005 U.S. Dist. LEXIS 38414, *2-4 (N.D. Ill. Aug. 24, 2005) ("Ex parte orders of very limited scope and brief duration may be justified in order to preserve evidence where the applicant shows that notice would result in destruction of evidence." (citation omitted)). A wide variety of statutes, cases, and procedural rules allow for the kind of discovery to protect property that Iomed obtained in the underlying action.

The discovery procedure authorized by Utah's Uniform Trade Secrets Act supports the validity of the discovery sought by Iomed in the underlying action. Section 13-24-3(3) of the Act states that, "[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order." Utah Code Ann. §13-24-3(3). Section 13-24-6 of the Act provides that "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." Id. §13-24-6. Interpreting these provisions, in Envirotech Corp. v. Callahan, 872 P.2d 487 (Utah Ct. App. 1994), the trial court granted the plaintiff's motions for *ex parte* writs of replevin and assistance to recover trade secrets that had been misappropriated by the defendants. Id. at 490. Under the issued writs, the constable searched the defendants' homes and business. Id. Notably, the writs were sought by the plaintiff "[u]pon filing its complaint," not after the court had determine whether the defendants had actually stolen trade secrets. Id. In essence, the plaintiff's writs for replevin and assistance were made in the context of discovery, just as in the present case. The court upheld the issuance of the writs in the face of a due process challenge. Id. at 492.

Similarly, under section 1116(d) of the Lanham Act, courts can issue an "'*ex parte* seizure order in civil actions alleging a trademark infringement that involves the use of a counterfeit mark.'" MRC Golf, Inc. v. Hippo Golf Co., 2009 WL 500637, at *1 (S.D.

Cal., Feb. 26, 2009) (citing In re Lorillard Tobacco Co., 370 F.3d 982, 984 (9th Cir. 2004)); see also Wangson Biotechnology Group, Inc. v. Tan Tan Trading Co., 2008 WL 4239155, at *2 (N.D. Cal. Sept. 11, 2008). The purpose of the statutory provision is "'to preserve the evidence necessary to bring trademark counterfeiters to justice'" and "'protect the integrity of evidence in [a] pending civil action.'" MRC Golf, Inc., at *2 (citing In re Lorillard Tobacco Co., 370 F.3d 982, 987 (9th Cir. 2004)). Congress added the ex parte seizure provisions to the Lanham Act because of the "propensity of 'those who deal in counterfeits . . . to destroy or transfer counterfeit merchandise when a day in court is on the horizon. The ex parte seizure procedure is intended to thwart this bad faith tactic, while ensuring ample procedural protections for persons against whom such orders are issued.'" Earth Products Inc., v. Gordo Enters. Inc., 2005 WL 3007125, at *1 (W.D. Wash., Nov. 9, 2005) (citing 130 Cong. Rec. H12076 at 12080 (Oct. 10, 1984)).

Ex parte discovery orders are also justified under statutes that provide for injunctive relief to prevent violations of the law, but which do not specifically authorize ex parte discovery orders. For example, in AT&T Broadband v. Tech Communications, Inc., 381 F.3d 1309, 1312 (11th Cir. 2004), AT&T obtained an ex parte order to seize Mr. Marmer's business records because they alleged that he sold illegal cable descrambling machines that allowed buyers to obtain AT&T's cable service for free. Id. at 1311. The court allowed AT&T representatives, along with federal marshals, to enter, search, and remove business records relating to the sale of descrambling devices, including such information contained on "hard drives, servers, disks, and tapes," from Mr. Marmer's residence. Id. at 1313. Notably, the court upheld the ex parte seizure order in the face of Mr. Marmer's challenge to its constitutionality under the Fourth Amendment. Id. at 1318 n.12.

The court in AT&T Broadband rejected the argument that ex parte discovery orders are inappropriate, absent explicit congressional authorization like that found in section 1116(d) of the Lanham Act. Id. at 1318. As justification, the court cited section

553(c)(2)(A) of the Cable Communications Policy Act, which states the court may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)(1) of this section." 47 U.S.C. § 553(c)(2)(A). The court held that the equitable remedy of an "*ex parte* search and seizure order directed at the defendant's residence" is consistent with the "district court's inherent equitable authority" and that, in the absence of some statutory limit on the district court's equitable authority, an *ex parte* seizure order was appropriate. AT&T Broadband, 381 F.3d at 1318-19.[13]

The Utah Rules of Civil Procedure provide ample authority for the use of ex parte discovery orders and court-authorized searches to protect property from potential destruction or misuse. Rule 64A and 65B of the Utah Rules of Civil Procedure provide that the court may issue an *ex parte* orders in certain circumstances. In Fimab-Finanziaria Maglificio Biellese Fratelli Fila S.P.A. v. Kitchen, 548 F. Supp. 248 (S.D. Fla. 1982), the court issued an *ex parte* seizure order under Rule 65(b) of the Federal Rules of Civil Procedure (similar to Utah's Rule 65A(b)) after the plaintiffs made a sufficient showing that notice "would be likely to result in the disappearance of the counterfeit FILA goods and related records . . . jeopardizing plaintiffs' ability to prevent irreparable injury, to stop the distribution of counterfeit FILA products, and to determine the source and extent of the defendants' dealings in the counterfeit FILA products." Id. at 249. The court acknowledged the existence of "burgeoning case law around the country which have recognized and approved as both appropriate and necessary judicial relief the granting of temporary restraining orders without notice, expedited discovery, and immediate seizure by the United States Marshal of counterfeit goods." Id. at 249 (collecting cases). Notably, the court's expansive order allowed the plaintiff's attorneys

[13] The Copyright Act also allows plaintiffs to move the court *ex parte* to impound equipment used for copyright infringement and records of the "manufacture, sale, or receipt of things involved in any such violation" "[a]t any time while an action under [the Copyright Act] is pending." 17 U.S.C.A. § 503(1); id. at § 503(3).

to accompany the United States Marshal to personal residences "to identify the counterfeit goods and . . . records" identified in the order. Id. at 250-51.

Finally, multiple courts have exercised their general jurisdiction to protect property rights of parties through the issuance of ex parte seizure orders. See Joel v. Various John Does, 499 F. Supp. 791, 792 (E.D. Wis. 1980) (issuing an ex parte temporary restraining order authorizing the plaintiff to seize unauthorized merchandize, even though the defendants were yet unnamed); Pepe (U.K.) Ltd. v. Ocean View Factory Outlet Corp., 770 F. Supp. 754, 760, 762 (D. P.R. 1991) (holding that the issuance of the ex parte seizure order was justified under multiple federal and state laws, the court's inherent equitable power, and the Puerto Rico Rules of Civil Procedure); AT&T Broadband, 381 F.3d at 1318-19 (holding that ex parte search and seizure orders are consistent with the "district courts' inherent equitable authority").

**D. The Discovery Order is not Unconstitutional.**

Despite plaintiffs' arguments to the contrary, *ex parte* seizure orders, like the one issued in this case, are not *per se* unconstitutional under either the Fourth Amendment to the U.S. Constitution or under the Utah Constitution. As set forth above, seizure orders are routinely issued by courts—including orders that allow for the entry and seizure of material at a defendant's home.[14] Nevertheless, the plaintiffs argue in their opening brief

[14] In Owens v. Swan, 962 F. Supp. 1436 (D. Utah 1997), the court found no constitutional infirmity for an order allowing attorneys to enter a defendant's home. In Owens, Wells Fargo Bank, as a judgment creditor in an underlying civil suit, obtained a writ of assistance from a Utah state court authorizing its attorneys to enter the judgment debtor's home to inventory the contents. Id. at 1438. After execution of the writ, the judgment creditors asserted section 1983 and state law claims against the bank and its law firm (including an individual attorney) for conducting an allegedly unconstitutional search of their home. Id. at 1439. The district court dismissed the civil rights claims, holding that the defendants' entry into the debtors' home satisfied the Fourth Amendment's reasonableness standard for a civil case. "In the civil context . . . the standards of reasonableness are less stringent than in the criminal context. . . . Although notions of probable cause and specificity guide courts in the determination of the overall reasonableness of a civil search, they do not apply strictly in the case of an administrative or civil order of seizure." Id. at 1440.

that the Discovery Order was unconstitutional because the "Utah Supreme Court expressly outlawed private search warrants." The authority cited by plaintiffs, however, does not support the conclusion that seizure orders are *per se* unconstitutional.

Plaintiffs cite Allen v. Trueman, 110 P.2d 355 (Utah 1941), for the proposition that the Discovery Order was unlawful. The defendant in that case was a judge in the Second Judicial District in Davis County. The dispute centered on police seizure of milk bottles evidencing trade mark violations pursuant to a search warrant authorized under statute. Id. at 358. The Utah Supreme Court held that the search warrant was unreasonable under the circumstances and ordered the return of the milk bottles. Id. at 364. The Allen court objected specifically to the use of a search warrant, "an essentially criminal procedure for the attainment of . . . civil ends." Id. at 361. Consequently, it voided the statutory provision that allowed the court to issue a search warrant for a purported trademark violation. Id. at 361.

Significantly, the search warrant at issue in Allen improperly imported criminal procedures into a civil lawsuit; the search warrant was not styled as a discovery order issued pursuant to the Rules of Civil Procedure, like those described above. Id. at 361. Furthermore, the plaintiff in Allen sought relief in the Utah Supreme Court by writ of prohibition to prevent further proceedings in the underlying action. Id. at 359. It was not an after-the-fact damages claim against an attorney. Accordingly, Allen v. Trueman does not support a damages claim like the one at issue here, and it does not prevent the district court from issuing an *ex parte* discovery order to obtain and secure critical evidence that is subject to concealment or destruction, like the computer evidence recovered in the Iomed case.

In its sixty year history, Allen has never been cited for the proposition proposed by the plaintiffs — to challenge a discovery order reasonably necessary to preserve evidence. Nor has Allen been applied to challenge the execution of any of the *ex parte*,

pre-judgment writs to protect property outlined in Rule 64 of the Utah Rules of Civil Procedure, section 13-24-6 of the Uniform Trade Secrets Act, or other like provisions.

Plaintiffs also incorrectly argue that Judge Dee Benson of the United States District Court for Utah held that the Discovery Order was unlawful, and they incorrectly contend that the plaintiffs are collaterally estopped from challenging that alleged holding. Judge Benson in fact held that the plaintiffs failed to state a civil rights claim under 42 U.S.C. § 1983. He therefore dismissed the civil rights claim for lack of federal subject matter jurisdiction and declined to exercise pendant jurisdiction over the state claims. Yanaki v. Iomed, Inc., 319 F. Supp. 2d 1261, 1266 (D. Utah 2004), aff'd 415 F.3d 1204 (10th Cir. 2005), cert. denied sub nom. Yanaki v. Parr, Waddoups, Brown, Gee & Loveless, 126 S. Ct. 1919 (2006) (the "Civil Rights Action").

The comments of Judge Benson on which the plaintiffs rely are no more than dictum in a footnote. Judge Benson's comments constitute neither findings of fact nor legal conclusions necessary to the disposition of the Civil Rights Action, and they are not binding on this court. Furthermore, the defendants were not required to appeal the order of dismissal in the Civil Rights Action in light of Judge Benson's dictum, because they were the prevailing parties. Dunlap v. Stichting Mayflower Mountain Fonds, 2005 UT App 279, ¶ 4, 119 P.3d 302 (prevailing party need not appeal to preserve issues for future litigation).

## IV. PLAINTIFFS' UNDERLYING TORT CLAIMS ALL FAIL AS A MATTER OF LAW ON THE PLEADINGS.

In addition to failing because they are barred by the judicial proceedings and First Amendment privileges, and because the Discovery Order was not unlawful, each of plaintiffs' tort claims fails on the pleadings for the following independent reasons.

### A. Plaintiffs' Abuse of Process Claims Fails Because They Have Failed to Plead an Independent, Willful Act.

The Utah Supreme Court disfavors abuse of process claims because of the tort's "potential to impose an undue chilling effect on the ordinary citizen's willingness to ...

bring a civil dispute to court." Anderson Dev. Co., 2005 UT 36, ¶ 59 (internal citations omitted).[15] Because the abuse of process tort is disfavored, the Utah Supreme Court narrowly circumscribes its elements "so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent abuse of process . . . claim." Id. (internal citations omitted). The limited instances in which an abuse of process claim applies are outlined in Hatch v. Davis, 2006 UT 44, 147 P.3d 383. The "'essence' of the tort of abuse of process" is "'a perversion of the process to accomplish some improper purpose." Hatch, 2006 UT 44, ¶ 34 (citing Crease v. Pleasant Grove City, 519 P.2d 888, 890 (Utah 1974)). In order to prove the claim, the plaintiff must allege (1) "'an ulterior purpose'" and (2) "'a willful act in the use of the process not proper in the regular conduct of the proceeding.'" Id. ¶ 36 (citing Hatch v. Davis, 2004 UT App 378, ¶ 34, 102 P.3d 774)). Plaintiffs cannot meet these elements for two reasons.

First, even though plaintiffs claim that they have pled an ulterior motive, they have not pled "a willful act" in furtherance of an abuse of process. Hatch, 2006 UT 44, ¶ 33. Plaintiffs claim that the "ulterior motive" of the misuse of the legal process was to send a "message to its employees that they would be better off signing new agreements than leaving [Iomed] and risking their own homes being raided." (Opening Brief, at 15; R. 131.) Despite the fact that this alleged motive has nothing to do with plaintiffs (Mr. Yanaki had already left Iomed and thus could not be the target of this alleged motive), plaintiffs have failed to plead a willful act in support of this alleged motive. As noted by the Utah Supreme Court, the willful act cannot be the "legal process that the tortfeasor

[15] This is the precise policy reason for the broad application of the judicial proceedings privilege. See Price, 949 P.2d at 1258 (holding that the judicial proceedings privilege is designed to "ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions").

pursues according to his ulterior motive." Hatch, 2006 UT 44, ¶¶ 37, 39.[16] Without this independent requirement of a willful act, any litigation motivated by "spite, ill-will or any of the other less agreeable human emotions that frequently attach themselves to court papers" would form the basis for an abuse of process claim. Id. ¶ 38. Thus, "[u]se of legal process with a bad motive alone" is not enough; "a corroborating act of a nature other than legal process is also necessary." Id. ¶ 39. The Utah Supreme Court has held that the willful act element is "an obligation imposed on the complaining party to allege that the tortfeasor has confirmed through his conduct his improper ulterior motive for employing legal process against the plaintiff." Id. ¶ 40. In this case, plaintiffs' abuse of process claim was appropriately dismissed because they have failed to plead any corroborating willful act that is independent of the legal process.[17]

Second, the Utah Supreme Court has adopted the rule in Restatement (Second) of Torts § 682 cmt. b that "there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 49, 70 P.3d 17 (Utah 2003). The discovery motion and order

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[16] The Utah Supreme Court noted that "[i]t is easy to slip into the conceptual trap of simply defining the 'willful act' as the legal process that the tortfeasor pursues according to his ulterior motive. Such a definition would, however, render the 'willlful act' requirement superfluous." Id. ¶ 37.

[17] In support of their abuse of process claim, plaintiffs rely on Kool v. Lee, 143 P. 906 (1913). Kool is distinguishable. In Kool, the defendant met the first element of an abuse of process by filing a complaint "with malice and without probable cause," which caused the justice of the peace to arrest and confine the plaintiffs for a 20-hour period. Id. at 906. In a "willful act" establishing the second element of the abuse of process claim, the defendant "directed his teamster to take a load of goods to the premises . . . to enter and take possession, and, if necessary, to set aside [the plaintiffs'] things." Id. at 908. When the plaintiffs were released from jail and returned to their homes, "they found the doors locked, themselves evicted and dispossessed, their goods in the shanty, and the defendant in possession." Id. at 908. Unlike the case at hand, in Kool, the court did not order the defendants to take possession of the plaintiffs' home or authorize the defendants' subsequent actions at any point in the course of the judicial proceeding. The repossession by the defendants confirmed the fact that they were acting with an ulterior motive.

described in the First Amended Complaint were used to obtain and preserve evidence relevant in the Iomed case. Because Iomed's motion practice "was confined to its regular and legitimate function," and the order signed by the court was issued to preserve and obtain discoverable evidence, there was no abuse of process, even assuming plaintiffs could prove that defendants had an ulterior motive. See Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1571 (D. Utah 1995) (internal citations omitted), aff'd 78 F.3d 597 (10th Cir. 1996).

It is significant that plaintiffs did not seek relief from the third district judge for the discovery abuses about which they complain in this lawsuit. In Watters v. Dinn, 633 N.E.2d 280 (Ind. Ct. App. 1994), the defendant was an attorney who had represented one of the parents in a child custody dispute. The plaintiffs alleged abuse of process and invasion of privacy against the attorney on the ground that he improperly subpoenaed confidential mental health records of one of the plaintiffs without giving notice or opportunity to object. The Indiana Court of Appeals determined that the attorney had "abused the discovery process and was subject to sanctions in the trial court." Id. at 288. Nevertheless, the court held that the attorney's improper discovery procedures did not constitute abuse of process or invasion of privacy, irrespective of intent or motive, since the mental health records were discoverable in the child custody dispute and the attorney had a legitimate purpose for seeking their production. The court held that any abuse of the discovery process should be addressed, if at all, in the case in which the discovery took place. Id. at 289; see also Kachig v. Boothe, 99 Cal.Rptr. 393 (Cal. Ct. App. 1971) (judgment obtained through perjured testimony did not give rise to claim for malicious prosecution, and any irregularity in the prior case should have been raised in that proceeding).

Iomed was justified in this case in seeking to obtain Mr. Yanaki's computer records and other files in a manner that would preserve them and prevent their destruction. If the Parr Law Firm committed any impropriety in representing its client in

this endeavor (which they dispute), plaintiffs could have raised the issue in the underlying case before Judge Medley. They chose not to do so. They cannot now re-litigate the propriety of discovery orders entered years ago in another case.

### B. Plaintiffs' Claims for Invasion of Privacy and Trespass Fail Because the Parr Law Firm's Conduct was Undertaken in Compliance with a Court Order.

In Utah, the torts of invasion of privacy and trespass require proof of the defendants' wrongful or unreasonable intrusion upon plaintiffs' privacy or land. The right of privacy may only be invaded by an "unreasonable intrusion upon the seclusion of another." Cox v. Hatch, 761 P.2d 556, 563 (Utah 1988) (citing Restatement (Second) of Torts § 652A (1977)). Court-ordered discovery does not constitute an unreasonable intrusion to support a cause of action for invasion of privacy. See, e.g., Big Five Cmty. Servs. v. Jack, 782 P.2d 412, 414 (Okl. Civ. App. 1989) ("We cannot say the copying of documents pursuant to court-ordered discovery constitutes an unreasonable intrusion into the seclusion of another so as to support a cause of action for invasion of privacy." (internal citations omitted)).

Likewise, under Utah law, "trespass is a 'wrongful entry . . . upon the lands of another.'" Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1243 (Utah 1998) (emphasis added) (quoting O'Neill v. San Pedro, L.A. & S.L.R. Co., 114 P. 127, 128 (Utah 1911)). The entry complained of in this case was undertaken on the authority of an order entered by the Third District Court and therefore was not "wrongful" as a matter of law.

### C. Plaintiffs' Intentional Infliction of Emotional Distress Fails Because Plaintiffs Did Not Allege and Could Not Prove "Extreme and Outrageous Conduct."

To sustain to a claim for intentional infliction of emotional distress, plaintiffs must plead conduct on the part of defendants that is "extreme and outrageous." Prince v. Bear River Mutual Ins. Co., 2002 UT 68, ¶ 38, 56 P.3d 524. Conduct does not fall within that category "simply because it is tortious, injurious, or malicious, or because it would give

rise to punitive damages, or because it is illegal." Id. (internal citations omitted). The Utah Supreme Court has expressed caution with respect to claims for intentional infliction of emotional distress:

> Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefor. This is partly because such claims may easily be fabricated: or as sometimes stated, are easy to assert and hard to defend against.

Bennett, 2003 UT 9, ¶ 59 (quoting Franco v. The Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 25, 21 P.3d 198). In Bennett, the court held that allegations of improper use of legal process do not constitute a proper basis for a claim of intentional infliction of emotional distress. Id. ¶ 66; see also Anderson Dev. Co., 2005 UT 36, ¶ 56 (improper use of the legal process is insufficient to support a claim for intentional infliction of emotional distress). The First Amended Complaint in this case, therefore, fails as a matter of law to state a claim for intentional infliction of emotional distress.[18]

### D. Plaintiffs' Claim for Conversion Fails Because Mr. Yanaki's Computer Files Were Seized Pursuant to Court Order, and They were Maintained in the Custody of the Court.

The tort of conversion has been defined as "an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. . . . It requires such a serious interference with the owner's right that the person interfering therewith may reasonably be required to buy the goods." Allred v. Hinkley, 328 P.2d 726, 728 (Utah 1958). Plaintiffs have failed to state a claim for conversion because the property at issue – computer files and documents relating to Iomed's trade secrets – was taken pursuant to court order, and then maintained in the custody of the court. Plaintiffs cannot establish that the interference was "without lawful

[18] Moreover, Mr. Yanaki was not present when the acts complained of herein took place. Utah law requires that a plaintiff asserting a claim for intentional infliction of emotional distress based on outrageous behavior be present and witness the act giving rise to the cause of action, absent some compelling circumstance such as child abuse. Hatch, 2004 UT App 378, ¶¶ 51-53. No such circumstances exist in this case, and Yanaki's claim for intentional infliction of emotional distress must be dismissed for that reason as well.

justification." Pursuant to Judge Medley's Discovery Order, plaintiffs' attorneys had an opportunity to object to any material that was beyond the scope of discovery, but they made no such objection, and Mr. Yanaki was provided with copies of the materials retained by the court. The claim for conversion was therefore properly dismissed.

### E. Plaintiffs' Claim for Conspiracy Fails Because it is Unsupported by an Underlying Tort.

To recover for civil conspiracy, the plaintiffs must prove, among other things, that the alleged conspirators committed one or more "unlawful, overt acts." Peterson v. Delta Air Lines, Inc., 2002 UT App 56, ¶ 12, 42 P.3d 1253 (internal citations omitted). Without an underlying wrongful act, there can be no conspiracy: "[T]he conspiracy itself is not what gives rise to the right to action, but the torts committed in the furtherance of the conspiracy." Israel Pagan Estate v. Cannon, 746 P.2d 785, 794 (Utah Ct. App. 1987). As demonstrated above, the Parr Law Firm in this case did not engage in any unlawful or tortious conduct, and the claim for conspiracy was therefore properly dismissed.

## CONCLUSION

The district court properly dismissed plaintiffs' tort claims. All of plaintiffs' tort claims arise from the Parr Law Firm's communications and actions in representing its client in the Iomed case. Specifically, the plaintiffs seek millions of dollars in damages in this case based on the Parr Law Firm's obtaining and implementing the Discovery Order seeking to preserve critical evidence for its client. Not only was the Discovery Order not unlawful as claimed by plaintiffs, but it was reasonable and necessary to preserve crucial evidence. Regardless of whether it was lawful, however, the Parr Law Firm's conduct in representing their client was privileged. A necessary corollary of the absolute privilege for written and oral statements made by an attorney is that attorneys must be free to take action that is specifically authorized by the courts before which they appear. For all of these reasons, this Court should affirm the dismissal of Counts II through VII of the Amended Complaint.

DATED this 9th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2009, a true and correct copy of the foregoing was served U.S. Mail, postage prepaid, to the following:

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